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No. 08-1104

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In the Supreme Court of the United States

KENDALL TANKERSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA ,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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ARGUMENT

I. This Appeal Provides An Appropriate Vehicle For The Court To Resolve The Undisputed And Mature Circuit Split Regarding The Fundamental Issue Of Appellate Review Of Departure Decisions.

In opposition to Ms. Tankersley's Petition for Certiorari, the United States does not dispute the existence of a nine-to-two circuit split concerning a matter of fundamental appellate review of federal sentencing that fully warrants this Court's exercise of certiorari review. Instead, the United States opposes a grant of certiorari on the ground that this particular case supposedly does not present a good "vehicle" for resolving the circuit split. (Brief in Opp. at 11.) None of the purported bases for this assertion survive close scrutiny, however.

The United States contends that this case is not "a suitable vehicle" because Ms. Tankersley's sentence "was reasonable under any standard." (Brief in Opp. at 11.) But that assertion merely begs the questions presented by the Petition for Certiorari:

- Now that the Sentencing Guidelines are advisory under *United States v. Booker*, 543 U.S. 220 (2005), is a court of appeals still required to review the propriety of a departure from the Guidelines distinctly from review of the ultimate sentence for reasonableness?

- Does *Booker*'s mandate that federal courts calculate and take into consideration the Guidelines include the departure Guidelines? 543 U.S. at 264.

- Does the rule in *Williams v. United States*, 503 U.S. 193 (1992) – that a sentencing court's use of an erroneous ground for departure constitutes an incorrect application of the Guidelines – remain valid after *Booker*?

- Is it tenable for the courts of appeals and district courts in a minority of two circuits to continue to treat departures as "obsolete" and "anachronistic" in the wake of this Court's recent opinion in *Irizarry v. United States*, 128 S.Ct. 2198 (2008), which emphasizes the categorical distinction between departures and variances?

- Given that *Gall v. United States*, 128 U.S. 586 (2007), requires federal courts to consult the Guidelines as the initial benchmark in the sentencing process and to consider the magnitude of any deviation from the correctly calculated Guidelines range, how could the court of appeals properly rule upon the reasonableness of Ms. Tankersley's sentence without determining what her guideline range would have been under a correct application of the Guidelines, including the departure Guideline set forth at U.S.S.G. § 5K2.0?

The Brief of the United States in Opposition does not address any of these key questions. Indeed, the

Brief in Opposition fails to even mention, let alone discuss, *Irizarry* and *Gall.*

A. The Existence Of Several Meritorious Claims Of Departure Error That Were Not Reviewed By The Court Of Appeals Is Unrebutted.

The United States asserts that Ms. Tankersley's claims that the district court abused its discretion by imposing the 12-level upward departure would fail on their merits if subjected to traditional appellate review. (Brief in Opp. at 11.) The United States' analysis of Ms. Tankersley's as yet unreviewed appellate challenges to the upward departure are simply incorrect.

Ms. Tankersley has a meritorious claim that the district court's upward departure was improper because U.S.S.G. § 5K2.0 authorizes a departure only where "the court finds 'that there exists an aggravating or a mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that prescribed.'" U.S.S.G. § 5K2.0 (2000) (App., 72a). The basis for Ms. Tankersley's claim is that the Sentencing Commission had previously promulgated a broader terrorism enhancement guideline, U.S.S.G. § 5K2.15 (1989) (App., 76a), which failed to draw the governmental/private distinction embodied in § 3A1.4 (2000) (App., 75a), the sole basis for the upward departure here. (App., 37a, 45a, 61a-64a.)

The United States' cursory attempt to dispense with this threshold argument is unpersuasive. (Brief in Opp. at 13 n.6.) The issue is not whether "the aggravating circumstance was already factored into the Guidelines calculation," as the United States wrongly suggests, but rather whether the court may properly find that such aggravating circumstance was not adequately taken into consideration by the Sentencing Commission in formulating the Guidelines, as required under § 5K2.0 (2000) (App., 72a). Here, the impact of terrorism on nongovernmental entities had been taken into consideration by the Commission, as evidenced by the earlier promulgation of § 5K2.15 (1989). That guideline, however, had been replaced by the year 2000, for the version of the Guidelines applicable to Ms. Tankersley's sentencing.[1]

Tellingly, the United States offers no arguments whatsoever to attempt to rebut Ms. Tankersley's two additional, as yet unreviewed claims of departure error, each of which is independently sufficient to require remand:

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[1] The United States accurately characterizes a subsequent amendment to the commentary of § 3A1.4 suggesting that upward departures may be warranted for terrorism offenses targeting a civilian population. (Brief in Opp. at 13 n.6.) The United States fails to explain, however, that the district court expressly declined to apply this provision to Ms. Tankersley or her co-conspirators, due to ex post facto concerns and because the government had stipulated that the 2000 version of the Guidelines applied. *United States v. Thurston*, 2007 WL 1500176, at **15-16 (D.Or. May 21, 2007) (Aiken, J.). The United States did not cross-appeal this ruling.

- The departure was unwarranted because there was no evidence of harm sufficient to remove this case from the heartland of arson offenses. (Pet. at 24-25 (citing Appellant's Opening Brief at 27-29 and Appellant's Reply Brief at 18-20).) The court of appeals expressly declined to review this claimed error. (App., 29a-31a.)

- The magnitude of the departure – which *more than tripled* the bottom of the otherwise applicable guideline range – was excessive. (Pet. at 25-26 (citing Appellant's Opening Brief at 29-34 and Appellant's Reply Brief at 21-23).) The court of appeals failed to mention this claimed error. (App., 1a-35a.)[2]

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[2] The United States contends that Ms. Tankersley was not subject to the full impact of the terrorism enhancement, and that if she had been, her range would have been "84 to 105 months." (Brief in Opp. at 13 n.5.) It is technically correct that the district court did not enhance Ms. Tankersley's criminal history category to Category VI (the highest category), as provided for in § 3A1.4(b). However, for each of the co-conspirators, the government and the district court used the magnitude of the substantial assistance downward departures to partially offset some of the harshness of either the terrorism enhancement under § 3A1.4 or the analogous upward departure pursuant to § 5K2.0 (but in the latter instance, to a lesser extent). *See, e.g., United States v. Thurston*, 2007 WL 1500176, at *4 (D.Or. May 21, 2007) (Aiken, J.).

Thus, in Ms. Tankersley's case, the United States' sentencing memorandum, which sought the § 3A1.4 terrorism enhancement against her, provided for a substantial assistance downward departure of up to 14 levels (much greater than the 4 levels that the United States actually recommended) and asked the district court to impose a sentence of 51 months – the same sentence the United States recommended following the district court's application of the upward departure instead of

In order to persuade this Court that Ms. Tankersley's case does not provide an appropriate vehicle for this Court to address the circuit split regarding appellate review of Guidelines departures, the United States would have to convince this Court that *none* of Ms. Tankersley's several arguments for departure error are meritorious. That it has not done.[3]

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the terrorism enhancement. (App., 64a.) If the district court had instead found the terrorism enhancement to be applicable, the United States would have made a substantial assistance motion for a reduction by whatever number of levels was necessary to achieve an applicable guideline range with a bottom end of 51 months. The district court's erroneous 12-level upward departure thus had exactly the same degree of impact on Ms. Tankersley's Guidelines range as the terrorism enhancement would have had, notwithstanding that she remained in Criminal History Category I.

[3] The United States currently challenges the district court's decision to require proof of the draconian terrorism enhancement by "clear and convincing evidence" (Brief in Opp. at 11-12 n. 4). But the United States did not appeal that decision, and it also did not appeal the district court's ruling that the terrorism enhancement was inapplicable to Ms. Tankersley's offenses. (App., 11a n.5.) The United States similarly chose not to appeal the district court's ruling that the terrorism enhancement did not apply to the offenses of one of Ms. Tankersley's co-conspirators. *United States v. Paul*, 290 Fed. Apx. 64, 2008 WL 3560333 (9th Cir. Aug. 12, 2008).

B. The United States Has Not And Cannot Demonstrate That The Departure Errors Are Harmless.

1. The United States is unable to present any persuasive argument that the departure errors committed by the district court are harmless. (Brief in Opp. at 13-14.) To be sure, this Court has held that a sentence resulting from a departure based in part on a legally erroneous ground may nonetheless be affirmed if deemed harmless:

> If the party defending a sentence persuades the court of appeals that the district court would have imposed the same sentence absent the erroneous factor, then a remand is not required under § 3742(f)(1), and the court of appeals may affirm the sentence as long as it is also satisfied that the departure is reasonable under § 3742(f)(2).

Williams v. United States, 503 U.S. 193, 203 (1992).

For the first time, the United States asserts that the district court here "would have imposed the same sentence" on Ms. Tankersley even absent the 12-level upward departure. (Brief in Opp. at 14.) The district court made no such comment during the two lengthy sentencing proceedings for Ms. Tankersley, however. (App., 36a-67a); *cf. United States v. Marsh*, 561 F.3d 81, 86 (1st Cir. 2009) (declining to resolve claimed departure error because "the district court stated that it would have reached the same result in a non-Guideline setting"); *United*

States v. Keene, 470 F.3d 1347, 1350 (11th Cir. 2006) (same).

Moreover, the facts and circumstances of the proceedings in the district court demonstrate that the United States cannot meet its burden to show harmlessness. It is undisputed that the district court conducted a total of twelve sentencing hearings for Ms. Tankersley and her co-conspirators, and that in each and every one, the court imposed a sentence that was within (what it had calculated to be) the ultimate Guidelines range. (Pet. at 27.) Indeed, the notion that the district court had some fixed sentence in mind for Ms. Tankersley that it would have imposed regardless of the advice of the Guidelines is belied by the record here; the court lowered Ms. Tankersley's sentence from the first sentencing hearing (46 months) to the second sentencing hearing (41 months), in each instance imposing the bottom of the Guidelines rage calculated by the court. (App., 48a-49a, 66a-67a.) *See United States v. Delgado-Martinez*, No. 08-50439, 2009 WL 902390, at *3 (5th Cir. Apr. 6, 2009) (failing to find that district court would have imposed the same sentence absent Guidelines error in part because the district court had expressly stated that it was selecting a sentence "at the bottom" of the applicable range).

2. The United States further argues that Ms. Tankersley "does not contend that her 41-month sentence is unreasonable under § 3553(a)" and that "any error under the departure provisions of the Guidelines is therefore harmless." (Brief in Opp. at 14.) The United States is doubly mistaken.

First and foremost, Ms. Tankersley does indeed contend that her sentence was procedurally and substantively unreasonable, given the district court's departure error. In her Opening Brief before the court of appeals, Ms. Tankersley argued that procedural error occurs when a district court improperly calculates the defendant's Guidelines range based on an erroneous departure. (Appellant's Opening Brief at 21-34.) Before both the court of appeals and this Court, Ms. Tankersley has noted that *Gall* requires reviewing courts to first ensure that the sentencing court has correctly applied the Guidelines range, including application of the departure Guidelines. (Appellant's Reply Brief at 28[4] ("Here, 'an unreasonable approach produced an unreasonable sentence.'") (citation omitted); Pet. at 13.) Ms. Tankersley has also argued that under *Gall*, review for substantive reasonableness must take into account the extent of any departure or variance from the Guidelines range, whereas the court of appeals opinion: (i) fails to address Ms. Tankersley's challenge to the excessive magnitude of the district court's departure; and (ii) fails to acknowledge that, absent the erroneous 12-level upward departure, the bottom of Ms. Tankersley's Guidelines range would have likely been only 12 months, or less than a third of the 41-month, bottom-of-the-range sentence ultimately imposed. (Pet. at 25-27.) Ms. Tankersley has also argued before the Ninth Circuit and this Court that the magnitude of the departure was unreasonable, citing a Seventh Circuit case, *United States v. Leahy*, 169

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[4] *Gall* was decided after Ms. Tankersley filed her Opening Brief in the Ninth Circuit.

F.3d 433, 438 (7th Cir. 1999), which reversed as unreasonable a slightly lesser (10-level) upward departure similarly imposed by analogy to the non-applicable terrorism enhancement. (Appellant's Opening Brief at 29; Pet. at 25-26.)[5]

Second, the United States' suggestion that the strict standard for harmless error is met whenever a sentence may be deemed "reasonable" (Brief in Opp. at 14) is incorrect. The Seventh Circuit recently emphasized the distinction between these two inquiries:

> It is important to emphasize that . . . our harmless error determination and review of the sentence's reasonableness are separate steps. . . . A finding of harmless error is only appropriate when the government has proved that the district court's sentencing error did not affect the defendant's substantial rights (here-liberty). To prove harmless error, the government must be able to show that he Guidelines error "did not affect the district court's selection of the sentence imposed." This is not the same thing as proving that the sentence was reasonable.

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[5] In keeping with its complete abdication of appellate review of most of the claimed departure errors, the court of appeals opinion fails to address *Leahy*. (*App.*, 1a-35a.)

United States v. Abbas, 560 F.3d 660, 667 (7th Cir. 2009) (finding Guidelines enhancement error harmless because the district court expressly stated that it would have imposed the same sentence even without the enhancement) (citations omitted).

II. Ms. Tankersley's Argument Regarding The Continuing Viability Of *Williams* After *Booker* Is Adequately Preserved.

The United States asserts a lack of preservation as to the second question presented – whether the holding in *Williams* that a sentencing court's use of an erroneous ground for departure constitutes an incorrect application of the Guidelines remains valid post-*Booker*. (Pet. at (i); Brief in Opp. at 15.) While it is accurate that before the court of appeals, Ms. Tankersley cited *Williams* in her Reply Brief but not in her Opening Brief, the *issue* of whether the use of an erroneous ground for departure constitutes an incorrect application of the Guidelines requiring reversal notwithstanding *Booker* was certainly raised in Ms. Tankersley's Opening Brief. (Appellant's Opening Brief at 21-29.) Thus, the United States apparently confuses preservation of an issue or claim with preservation of a particular argument in support of that claim or issue. This Court has cautioned against such confusion:

> Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below. Petitioners' arguments that the

> ordinance constitutes a taking in two different ways, by physical occupation and by regulation, are not separate *claims*. They are, rather, separate *arguments* in support of a single claim – that the ordinance effects an unconstitutional taking. Having raised a taking claim in the state courts, therefore, petitioners could have formulated any argument they liked in support of that claim here.
>
> A litigant seeking review in this Court of a claim properly raised in the lower courts thus generally possesses the ability to frame the question to be decided in any way he chooses, without being limited to the manner in which the question was framed below. . . . The petitioner can generally frame the question [presented] as broadly or as narrowly as he sees fit.

Yee v. Escondido, 503 U.S. 519, 534-35 (1992); see also *Harris Trust and Savings Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238, 245 n.2 (2000) (rejecting assertion that petitioners had waived a certain statutory theory by neglecting to present it to the courts below, because petitioners' newly articulated focus on that provision was "merely an argument" in support of their squarely presented claim for relief based on another statutory provision); *Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374 (1995) (this Court could properly consider an argument disavowed before the lower courts and not explicitly raised until the merits

briefs in this Court, because the argument was "not a new claim, but a new argument to support [an existing claim]" and was "passed upon below" and "was fairly embraced within the question presented and the argument set forth in the petition").

In any event, the specific argument concerning the continuing viability of *Williams* was "pressed below" (Appellant's Reply Brief at 28), and therefore, a grant of certiorari is not precluded. *United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'"). Because "this rule operates in the disjunctive," *id.*, this conclusion is not altered by the fact that the court of appeals chose not to explicitly address the *Williams* argument. Moreover, it is inarguable that the court of appeals opinion implicitly rejects the continuing force of *Williams* as binding precedent. (App., 29a-31a.)

The United States offers no defense to the *Williams* argument on its merits, other than to reiterate its harmless error argument, addressed *supra* at 7-11. (Brief in Opp. at 15-16.)

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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